

# The Vulnerability of Indigenous Land Rights in Australia and Canada

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# The Vulnerability of Indigenous Land Rights in Australia and Canada

## **Abstract**

Not until the 1990s did the highest courts in Australia and Canada begin to address the colonial reality of the dispossession of the Indigenous peoples. In Australia, the High Court has held that the taking of Indigenous lands and creation of third party rights by the Crown resulted in extinguishment of Native title. In Canada, while not dealing directly with the issue of extinguishment, the Supreme Court has authorized infringement of Aboriginal land rights for a variety of purposes, including the creation of third party rights. This article examines the legal justifications for these conclusions and finds that they are not consistent with long-standing principles and precedents of the common law. The explanations for these judicial opinions, the author argues, can be found instead in economic and political considerations that have been influencing the courts. He suggests that this is a reality Indigenous peoples need to take into account when deciding whether to expose their rights to the judicial authority of the Australian and Canadian states.

## **Keywords**

Canada; Australia; Indigenous people--Land tenure; Indians of North America--Land tenure

# THE VULNERABILITY OF INDIGENOUS LAND RIGHTS IN AUSTRALIA AND CANADA<sup>©</sup>

BY KENT MCNEIL\*

Not until the 1990s did the highest courts in Australia and Canada begin to address the colonial reality of the dispossession of the Indigenous peoples. In Australia, the High Court has held that the taking of Indigenous lands and creation of third party rights by the Crown resulted in extinguishment of Native title. In Canada, while not dealing directly with the issue of extinguishment, the Supreme Court has authorized infringement of Aboriginal land rights for a variety of purposes, including the creation of third party rights. This article examines the legal justifications for these conclusions and finds that they are not consistent with long-standing principles and precedents of the common law. The explanations for these judicial opinions, the author argues, can be found instead in economic and political considerations that have been influencing the courts. He suggests that this is a reality Indigenous peoples need to take into account when deciding whether to expose their rights to the judicial authority of the Australian and Canadian states.

Il a fallu attendre les années 1990 pour que les plus hautes instances juridiques de l'Australie et du Canada commencent à s'occuper d'une réalité coloniale, celle du dépouillement des peuples autochtones. En Australie, la High Court a statué que l'appropriation des terres autochtones et l'établissement de droits en faveur de tiers, par la Couronne britannique, avaient entraîné la prescription du droit de propriété des natifs. Au Canada, sans traiter directement le problème de la prescription, la Cour Suprême a autorisé la transgression des droits des autochtones sur les terres, dans le cadre d'une diversité d'objectifs, comme l'établissement de droits en faveur de tiers. Cet article examine les justifications juridiques de ces conclusions, et constate qu'elles ne sont pas cohérentes avec les principes et précédents de la *common law*, établis de longue date. Les explications de ces opinions judiciaires, selon l'auteur, se trouvent plutôt dans les considérations économiques et politiques qui ont influencé les tribunaux. Il suggère qu'il existe une réalité, dont les peuples autochtones doivent tenir compte, avant de décider s'ils vont soumettre leurs droits au jugement de l'autorité juridique de l'État australien et de l'État canadien.

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Land has figured prominently in the histories of interaction between Indigenous peoples and European settlers in Australia and Canada. Despite significant differences in the treatment of Indigenous peoples in each country, the histories of both have been marked by the disempowerment and dispossession of those peoples as the British Crown imposed its political authority and distributed Indigenous lands to incoming settlers. In some parts of Canada, a degree of Indigenous consent was obtained in the form of treaties. In other places, including all of Australia and most of British Columbia, no consent was obtained and no compensation was paid. Nor, until recently, were the Indigenous peoples in a position to seek redress from the courts for the loss of their lands. As a result, pressing issues of Indigenous land rights have been left unresolved in both nations.

Recent cases involving Indigenous land rights have forced the High Court of Australia and the Supreme Court of Canada to confront, however reluctantly, the colonial reality of European settlement. This article will focus on an important consequence of the settlement process, namely the impairment of Indigenous land rights through the creation of third party interests by Crown grant. My starting points will be the High Court of Australia's decision in *Mabo v. Queensland [No. 2]*<sup>1</sup> and the Supreme Court of Canada's decision in *Delgamuukw v. British Columbia*.<sup>2</sup> In *Mabo*, the High Court dealt with the issue of extinguishment of Indigenous land rights by creating an exception to the standard protection against Crown grant accorded to property rights by the common law. In *Delgamuukw*, the Supreme Court was less forthcoming in this respect, limiting its discussion of extinguishment to the context of the constitutional division of powers between the federal and provincial governments and its treatment of apparently less-intrusive infringement to the period following constitutional recognition of Aboriginal rights in 1982.<sup>3</sup> Despite these differences, and the obvious historical and constitutional disparities between Australia and Canada, the decisions in

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<sup>1</sup> (1992), 175 C.L.R. 1 [*Mabo*].

<sup>2</sup> [1997] 3 S.C.R. 1010 [*Delgamuukw*]. Also relevant is the recent Ontario Court of Appeal decision in *Chippewas of Sarnia Band v. Canada (Attorney General)*, [2001] 1 C.N.L.R. 56 [*Chippewas of Sarnia*] (leave to appeal refused 8 November 2001, motion to reconsider refusal of leave dismissed 13 June 2002: [2002] 3 C.N.L.R. iv (S.C.C.)), but given that space is limited in this article, I have chosen to discuss only High Court and Supreme Court decisions. For critical commentary on the *Chippewas of Sarnia* decision, see James I. Reynolds, "Aboriginal Title: The Chippewas of Sarnia" (2002) 81 Can. Bar Rev. 97; Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33 Ottawa L. Rev. 301. Compare Paul M. Perell & Jeff G. Cowan, "In Defence of Chippewas of Sarnia Band v. Canada (Attorney General)", Case Comment (2002) 81 Can. Bar Rev. 727.

<sup>3</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

*Mabo* and *Delgamuukw* share a common theme: the vulnerability of Indigenous land rights to the creation of third party interests by the Crown. This article will analyze this aspect of the decisions, and suggest that the explicit explanations for this vulnerability given by the High Court and Supreme Court do not tell the whole story. Lurking behind the decisions, in my opinion, are other explanations that relate more to political stability and economic priorities than to legal principle and precedent.

## I. *MABO* AND SUBSEQUENT HIGH COURT DECISIONS

The *Mabo* decision is, of course, a landmark in Australian law. After over two hundred years of denial of Indigenous land rights by governments and judges,<sup>4</sup> the High Court boldly and courageously held that this denial had been based upon erroneous application of the common law. Contrary to the prevalent colonial attitude up to 1992, a majority of the Court decided that after the acquisition of British sovereignty the Indigenous peoples continued to have what is known in Australia as native title to any lands they had a connection with under their traditional laws and customs.<sup>5</sup> This aspect of the decision is well-supported by legal principle, as well as by common law precedents in other jurisdictions that were colonized by Britain, especially Canada, New Zealand, and the eastern United States.<sup>6</sup> In effect, the High

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<sup>4</sup> See Heather McRae *et al.*, *Indigenous Legal Issues: Commentary and Materials*, 3rd ed. (Pymont, N.S.W.: Lawbook, 2003) at 17-59, 232-37. Government denial is evidenced, for example, by the failure of the Crown to sign treaties. See, however, Henry Reynolds, *Fate of a Free People* (Ringwood, Vic.: Penguin Books, 1995), suggesting that a treaty may have been entered into with Indigenous peoples in Tasmania. The most direct judicial denial can be found in Blackburn J.'s decision in *Milirrpum v. Nabalco Pty.* (1971), 17 F.L.R. 141 (N.T.S.C.). For further discussion, see Kent McNeil, "A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?" (1990) 16 *Monash U.L. Rev.* 91.

<sup>5</sup> Brennan J. (Mason C.J. and McHugh J. concurring), Deane and Gaudron JJ., and Toohey J. wrote separate judgments, all arriving at this conclusion. Dawson J. dissented. As Brennan J.'s decision expressed the majority position on extinguishment, it will be the focus of the present discussion. For analysis of Deane and Gaudron JJ.'s and Toohey J.'s positions on extinguishment, see Kent McNeil, "Racial Discrimination and Unilateral Extinguishment of Native Title" (1996) 1 A.I.L.R. 181 ["Racial Discrimination"], reprinted in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 357 [*Emerging Justice?*]. On the role of traditional laws and customs, see "The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law" in *Emerging Justice?* 416. Recently, the High Court has also held that native title can be lost through failure to preserve the requisite connection with the land through maintenance of the traditional laws and customs on which that title is based. See *Yorta Yorta Aboriginal Community v. Victoria* (2002), 194 A.L.R. 538. As this means of losing native title is distinct from extinguishment by Crown grant, it will not be discussed in this article.

<sup>6</sup> See Garth Nettheim, "Judicial Revolution or Cautious Correction? *Mabo v Queensland*" (1993) 16 U.N.S.W.L.J. 1; Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991), esp. at 83-143; and Kent McNeil, *Common Law Aboriginal*

Court's decision brought Australian law more or less into line with the rest of the common law world in this respect.

However, there is a vital aspect of the *Mabo* decision that cannot be readily justified on the basis of legal principle and precedent, namely the judges' views on extinguishment of native title. The Court held that, prior to the enactment of the *Racial Discrimination Act 1975* (Cth.), native title would have been extinguished to the extent that it was inconsistent with either a real property interest granted by the Crown or appropriation and use of the land by the Crown.<sup>7</sup> Justice Brennan (as he then was) provided a broad justification for this:

Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory. It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power.<sup>8</sup>

But as Justice Brennan went on to acknowledge, "under the constitutional law of [Australia], the legality (and hence the validity) of an exercise of sovereign power depends on the authority vested in the organ of government purporting to exercise it."<sup>9</sup>

The nub of the problem is this: in English and hence Australian constitutional law, the Crown in its executive capacity cannot infringe or take away vested rights, especially rights in relation to land, without unequivocal statutory authority.<sup>10</sup> This is a fundamental principle, going back at least to

*Title* (Oxford: Clarendon Press, 1989). Compare S.E.K. Hulme, "Aspects of the High Court's Handling of *Mabo*" (1993) No. 87 *Victoria Bar News* 29, responded to by Ron Castan & Bryan Keon-Cohen, "Mabo and the High Court: A Reply to S.E.K. Hulme, Q.C." (*ibid.* at 47).

<sup>7</sup> See *Mabo*, *supra* note 1, esp. at 63-70, Brennan J. However, in the absence of clear statutory authority to the contrary, Deane, Gaudron and Toohey JJ., dissenting on this issue, were of the view that the Crown grant or appropriation would be wrongful, and therefore would result in a claim for compensation (see *ibid.* at 15, Mason C.J. & McHugh J.). For discussion of appropriation by the Crown and compensation, neither of which will be dealt with in this article, see "Racial Discrimination", *supra* note 5.

<sup>8</sup> *Mabo*, *supra* note 1 at 63 [footnote omitted]. Brennan J. relied solely on American authority for this. This is remarkable because American law does not in fact support his position on extinguishment. See Kent McNeil, "Extinguishment of Native Title: The High Court and American Law" (1997) 2 A.I.L.R. 365, reprinted in *Emerging Justice?*, *supra* note 5 at 409.

<sup>9</sup> *Mabo*, *supra* note 1 at 63.

<sup>10</sup> See William Blackstone, *Commentaries on the Laws of England*, 21st ed. (London: Sweet, Maxwell and Steves & Norton, 1844) vol. 1 at 127-29, 138-45; Herbert Broom, *Constitutional Law Viewed in Relation to Common Law*, 2d ed. by George L. Denman (London: W. Maxwell and Son, 1885) at 225-45; *Halsbury's Laws of England*, 4th ed., vol. 8 (London: Butterworths, 1974) at paras. 828, 833; *Australian Communist Party v. The Commonwealth* (1951), 83 C.L.R. 1 at 230-31 (H.C.), Williams J.; and *Clunies-Ross v. The Commonwealth* (1984), 155 C.L.R. 193 at 201 (H.C.).

*Magna Carta*,<sup>11</sup> that was firmly entrenched in the sometimes bloody struggle between the Stuart kings and Parliament in the 17th century. It lies at the heart of both the rule of law and parliamentary sovereignty.<sup>12</sup>

Justice Brennan was obviously aware of the need for the Crown to have statutory authority to extinguish native title executively by grant. He said that in Queensland, where the *Mabo* case arose, “the Crown’s power to grant an interest in land is, by force of ss. 30 and 40 of the *Constitution Act 1867* (Q.), an exclusively statutory power and the validity of a particular grant depends upon conformity with the relevant statute.”<sup>13</sup> However, this raises the question of how the Crown could have extinguished native title by grant *prior* to receiving this statutory authority, which was first conferred on it in Australia in 1842.<sup>14</sup> Moreover, in the absence of clear and plain legislative intent to the contrary, statutory authority to grant lands would not allow the Crown to infringe or extinguish existing land rights. This is because a well-established principle of statutory interpretation requires legislation to be construed, if at all possible, in favour of vested rights and against authorizing executive interference with them, as it is presumed that legislatures do not intend to interfere with vested rights.<sup>15</sup> Justice Brennan seems to have acknowledged this as well, but he tried to avoid its implications by saying that the presumption only applies to prevent “impairment of an interest in land granted by the Crown or dependent on a Crown grant.”<sup>16</sup> He accordingly concluded that, “as native title is not granted by the Crown, there is no comparable presumption affecting the conferring of any executive power on

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<sup>11</sup> In *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 at 569 (H.L.) [*De Keyser's Royal Hotel*], Lord Parmoor said: “Since *Magna Carta* the estate of a subject in lands or buildings has been protected against the prerogative of the Crown.”

<sup>12</sup> See *The Proclamations Case* (1610), 12 Co. Rep. 74 (K.B.); *Entick v. Carrington* (1765), 19 St. Tr. 1030 (C.P.); Broom, *supra* note 10 at 245, 386-88; and A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 9th ed. (London: MacMillan and Co., 1939) at 50-54.

<sup>13</sup> *Mabo*, *supra* note 1 at 63 [footnote omitted].

<sup>14</sup> In New South Wales, which until 1859 included the territory that then became the separate colony of Queensland, grants of land were originally made under the royal prerogative. Statutory authority for the Crown to grant lands was provided by the *Sale of Waste Lands Act, 1842* (U.K.), 5 & 6 Vict., c.36. See *Wik Peoples v. Queensland* (1996), 141 A.L.R. 129 at 171-72, Toohey J. [Wik]; Enid Campbell, “Crown Land Grants: Form and Validity” (1966) 40 A.L.J. 35.

<sup>15</sup> See *Newcastle Breweries, Limited v. The King*, [1920] 1 K.B. 854 at 866 (K.B.), Salter J.; *Attorney-General for Canada v. Hallet & Carey Ltd.*, [1952] A.C. 427 at 450 (P.C.), Lord Radcliffe [Hallett]; D.C. Pearce & R.S. Geddes, *Statutory Interpretation in Australia*, 3rd ed. (Sydney: Butterworths, 1988) at 106-07; and Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 370-76. For recent acknowledgement that this principle applies to native title, see *Wilson v. Anderson* (2002), 190 A.L.R. 313, esp. at 348-49 (H.C.A.), Kirby J., dissenting [Anderson].

<sup>16</sup> *Mabo*, *supra* note 1 at 64.

the Crown the exercise of which is apt to extinguish native title."<sup>17</sup>

With all due respect for Justice Brennan, there is no justification in legal principle or precedent to deny native title protection from executive action simply because that title is not derived from Crown grant.<sup>18</sup> On the contrary, the principle that statutes should be interpreted, if possible, so as not to authorize executive interference is of general application—it is not limited to protecting property rights that originate from the Crown.<sup>19</sup> That a Crown grant does not confer some special protection should be evident to anyone familiar with English legal history, as it is a well-known fact that most land titles in England were not derived from Crown grant.<sup>20</sup> It is therefore not surprising that the protection accorded to real property rights by the common law has never depended on their source.<sup>21</sup> This is evident as well in situations where titles originating from adverse possession are concerned, as those titles are no more vulnerable to executive interference than titles that originate from Crown grant.<sup>22</sup>

Justice Brennan nonetheless held that, for native title to be extinguished by either legislative or executive action, the intention for that to

<sup>17</sup> *Ibid.*

<sup>18</sup> For more detailed discussion, see "Racial Discrimination", *supra* note 5, esp. at 192-98 (*Emerging Justice?* at 370-79).

<sup>19</sup> See, e.g. *Hallet*, *supra* note 15, where the Privy Council accepted that this principle applied in the context of executive taking of oats and barley, title to which obviously would not have been derived from Crown grant. At 450, Lord Radcliffe stated the principle in broad terms: "there is a well-known principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a 'strict' construction." See also *The Queen v. Colet*, [1981] 1 S.C.R. 2 at 10. For further authority that the protection is not limited to property rights derived from the Crown, see "Racial Discrimination", *supra* note 5 at 193-94 (*Emerging Justice?* at 372-74).

<sup>20</sup> See Blackstone, *supra* note 10, vol. 2 at 51-52; Charles Yorke, *Considerations on the Law of Forfeitures, for High Treason*, 4th ed. (London: J. Williams, 1775) at 64-65; *Attorney-General v. Brown* (1847), 1 Legge 312 at 318 (N.S.W.S.C.); *Doe d. Wilson v. Terry* (1849), 1 Legge 505 at 508-09 (N.S.W.S.C.); and *Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767 at 771-72 (P.C.).

<sup>21</sup> In *Attorney-General for the Isle of Man v. Mylchreest* (1879), 4 App. Cas. 294 (P.C.), customary land rights prevailed against a Crown grant. For further authority and discussion, see "Racial Discrimination", *supra* note 5 at 192-97 (*Emerging Justice?* at 372-78).

<sup>22</sup> In *Perry v. Clissold*, [1907] A.C. 73, the Privy Council affirmed a decision of the High Court of Australia that the Crown had to pay compensation to an adverse possessor when it expropriated the land he possessed, even though he did not yet have a valid title as against the person who had been dispossessed because the statutory limitation period had not run out. For instances where title was acquired against the Crown by adverse possession, see *Attorney-General for British Honduras v. Bristowe* (1880), 6 App. Cas. 143 (P.C.); *Attorney-General for New South Wales v. Love*, [1898] A.C. 679 (P.C.). Moreover, even when good title is obtained at the end of the limitation period, it is derived from possession, not from the statute, the effect of which is simply to extinguish other claims. See *Tichborne v. Weir* (1892), 67 L.T. 735 (C.A.); *Fairweather v. St. Marylebone Property*, [1963] A.C. 510, esp. at 535 (H.L.).



occur had to be clear and plain.<sup>23</sup> He did not find such an intention in the statutory law of Queensland relating to land.<sup>24</sup> However, he apparently concluded that the necessary intent could be found in Crown grants of interests that were inconsistent with native title. But as the common law does not allow the Crown to infringe or extinguish vested rights, authority for the Crown to do so must be clearly and plainly provided by statute. What is missing from Justice Brennan's judgment is identification of the statutory provisions that clearly and plainly empowered the Crown to infringe or extinguish native title by grant.<sup>25</sup>

The extinguishment-by-grant aspect of the *Mabo* decision has nonetheless been followed in subsequent cases, with the same lack of attention to and respect for fundamental legal principles and precedents. As in *Mabo*, the High Court has generally failed to identify the source of the Crown's authority to infringe or extinguish native title. In *Western Australia v. The Commonwealth*,<sup>26</sup> Chief Justice Mason and Justices Brennan, Deane, Toohey, Gaudron, and McHugh in their joint judgment said that, to the extent that a land title granted by the Crown "consists in ownership of or a legal or equitable interest in land, it cannot be extinguished without statutory authority."<sup>27</sup> However, they went on to rely on Justice Brennan's judgment in *Mabo* for the proposition that, "[a]t common law, ... native title can be extinguished or impaired by a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title."<sup>28</sup> As

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<sup>23</sup> *Mabo*, *supra* note 1 at 64. The same rule applies in Canada. See *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099 [*Sparrow*]; *Delgamuukw*, *supra* note 2 at 1120, Lamer C.J.C.

<sup>24</sup> *Mabo*, *supra* note 1 at 64-68.

<sup>25</sup> Brennan J. apparently thought that native title land was included in the definition of "Crown land" in s. 4 of the *Land Act 1910* (Qld.): *ibid.* at 65-66. He admitted, however, that this definition was no doubt based on the mistaken belief that "the absolute ownership of all land in Queensland is vested in the Crown until it is alienated by Crown grant": *ibid.* at 66. Moreover, as a general rule the Crown, like anyone else, cannot give what it does not have (this is the familiar *nemo dat* rule). See *The Case of Alton Woods* (1600), 1 Co. Rep. 40b at 43b-46b (K.B.); *Bristow v. Cormican* (1878), 3 App. Cas. 641 (H.L.); and Herbert Broom, *A Selection of Legal Maxims*, 8th ed. by Joseph Gerald Pearce & Herbert Chitty (London: Sweet and Maxwell, 1911) at 41 ("The Crown cannot dispense with anything in which the subject has an interest, nor make a grant in violation of the common law, or injurious to vested rights" [footnotes omitted]). So even if, as Brennan J. apparently concluded, the Queensland legislature inadvertently included native title lands in the definition of "Crown lands" (this is highly debatable: see discussion of an analogous statute in text accompanying notes 36-46), surely the legislators could not have intended thereby—and certainly could not have *clearly and plainly* intended—to exclude the application of the *nemo dat* rule in this context. If not invalid, Crown grants therefore should have been subject to native title, not *vice versa*.

<sup>26</sup> (1995), 128 A.L.R. 1 [*Western Australia*].

<sup>27</sup> *Ibid.* at 25, citing Brennan J.'s judgment in *Mabo*, *supra* note 1 at 64.

<sup>28</sup> *Western Australia*, *supra* note 26 at 25 [emphasis added].

a justification for this, they simply reiterated Justice Brennan's view in *Mabo* that, because native title does not originate from Crown grant, it is not protected by the rule that "a [Crown] grant cannot be superseded by a subsequent inconsistent grant made to another person."<sup>29</sup> No statutory authority empowering the Crown to infringe or extinguish native title was referred to in this context, as the Court apparently thought such authority to be unnecessary because the source of native title places it outside the protection that the common law accords to land titles that originate from Crown grant. As we have seen, this is inconsistent with well-established common law principles and precedents.

In *Wik Peoples v. Queensland*,<sup>30</sup> the High Court dealt with the question of whether Crown grants of pastoral leases necessarily extinguished native title. The majority decided that extinguishment need not have occurred,<sup>31</sup> as the pastoral leases in question did not create rights of exclusive possession, and so they could co-exist with at least some native title rights.<sup>32</sup> The majority nonetheless held, on the basis of *Mabo*, that the leases prevailed insofar as they were inconsistent with native title, leaving open the important issue of whether native title would be partially extinguished or merely suspended to the extent of any inconsistency.<sup>33</sup> But while the judges in *Wik* were able to rely on statute for the Crown's authority to grant pastoral leases,<sup>34</sup> they failed to identify a clear and plain legislative intention for this power to be exercised so as to infringe existing legal rights, including native title rights. In this respect, the decision suffers from the same lack of respect for the fundamental principle that the Crown cannot infringe or extinguish vested rights without unequivocal statutory authority.

The High Court nonetheless applied the extinguishment-by-grant doctrine derived from *Mabo* in *Fejo v. Northern Territory*.<sup>35</sup> *Fejo* involved a

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<sup>29</sup> *Ibid.*

<sup>30</sup> *Wik*, *supra* note 14.

<sup>31</sup> Toohey, Gaudron, Gummow and Kirby JJ. wrote separate judgments arriving at the same result.

<sup>32</sup> For discussion, see Kent McNeil, "Co-Existence of Indigenous Rights and Other Interests in Land in Australia and Canada" [1997] 3 C.N.L.R. 1.

<sup>33</sup> *Wik*, *supra* note 14, esp. at 182-90, Toohey J. Moreover, the majority did not accept Brennan J.'s suggestion in *Mabo*, *supra* note 1 at 68, that leases generally would extinguish rather than suspend native title. Brennan C.J. (as he had become), Dawson and McHugh JJ. concurring, dissented in *Wik* because he was of the view that the pastoral leases did confer a right of exclusive possession which extinguished native title.

<sup>34</sup> Pastoral leases in Australia are entirely statutory, as they have no common law counterpart. In Queensland, the statutory authority to grant the leases in question was provided by the *Land Act 1910* (Qld.) and the *Land Act 1962* (Qld.).

<sup>35</sup> (1998), 195 C.L.R. 96 [*Fejo*].

native title claim to land south of Darwin that had been granted in fee simple in 1882 and later compulsorily acquired by the Crown for a quarantine station. The High Court held unanimously that the Crown grant had completely extinguished native title to the land, and consequently the title was not revived when the Crown acquired the land in 1927.

The grant of the fee simple interest in *Fejo* had been made under the authority of a South Australia statute, the *Northern Territory Land Act, 1872*.<sup>36</sup> Section 8 of that Act provided:

Subject to the provisions of this Act, the Governor, in the name and on behalf of Her Majesty, may grant in fee simple, or for any less estate or interest, to the purchaser thereof, any waste lands, which grants shall be in such forms as shall from time to time be deemed expedient by the Governor in Council ... .

The term “waste lands” was defined in section 2:

All lands in the Northern Territory vested in Her Majesty which have not been or may not hereafter be reserved for, or dedicated to any public purpose, or which have not been granted or lawfully contracted to be granted to any person in fee-simple; and all lands which at the time of the coming into operation of this Act may have become, and which thereafter may become forfeited by reason of any breach in the conditions on which the same have been granted or leased, or contracted to be granted or leased[.]

Chief Justice Gleeson and Justices Gaudron, McHugh, Gummow, Hayne, and Callinan, in their joint judgment in *Fejo* (Justice Kirby wrote a separate concurring judgment), said this about the Crown’s statutory authority: “The power to deal with waste lands in the Northern Territory (which included the land granted [in 1882]) was to be found wholly within the 1872 Act. ... That Act permitted the making of an unqualified grant of an estate in fee simple.”<sup>37</sup> What is remarkable about this aspect of the decision is that the judges made no reference to the definition of “waste lands” in the NTLA, and so offered no explanation of why lands subject to native title would come within that definition. They simply stated that the granted lands had been waste lands, and so were subject to the Crown’s statutory power to create a fee simple interest.

Going through the analysis that the High Court conveniently avoided, we need to start with the definition itself: “waste lands” were “[a]ll lands in the Northern Territory vested in Her Majesty,” with the stated exceptions.<sup>38</sup> The definition therefore assumed that there were ungranted Crown lands in the

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<sup>36</sup> S.A., No. 28 of 1872 [NTLA]. At the time, the Northern Territory was administered by the colony of South Australia.

<sup>37</sup> *Supra* note 35 at 129.

<sup>38</sup> NTLA, *supra* note 36, s.2.

Northern Territory, the disposition of which would henceforth be regulated by the NTLA. No doubt it was also assumed, as was the case when the *Land Act 1910* was enacted in Queensland, that the Indigenous peoples in Australia did not have title to their traditional lands.<sup>39</sup> But as a result of *Mabo*, we now know that the second assumption, at least, was wrong. Moreover, native title can amount to a right “as against the whole world to possession, occupation, use and enjoyment” of land, as was declared in *Mabo*.<sup>40</sup> At least where that kind of native title is involved, the Crown’s title to the land is limited to what has been called an underlying or radical title that is equivalent to the title the Crown has as lord paramount over lands in England.<sup>41</sup>

Freehold lands in England that are held by private persons, whether as a result of long-standing undisputed title, adverse possession for the statutory limitation period, or Crown grant, are not regarded as Crown lands, whether waste or otherwise.<sup>42</sup> This is because the Crown does not have a present beneficial interest in those lands; instead, it has a lordship over them, an incorporeal thing which, in Maitland’s memorable words, is “quite distinct from the land over which it hovers.”<sup>43</sup> Similarly, lands that are subject to a native title amounting to the kind of exclusive interest that the Court found to exist in *Mabo* are not Crown lands, in the sense that those words are commonly used. So to treat them as “lands ... vested in Her Majesty” and thus bring them within the definition of “waste lands” in the NTLA is to misunderstand the nature of the Crown’s underlying or radical title to those lands. What the Crown has in this context is the equivalent of a lordship which, as Maitland has told us, is an incorporeal thing that the common law classified as “land,” but it is not the physical land itself. As lands subject to native title therefore should not be encompassed by the definition of “waste lands” in the NTLA, the statute could not have authorized the Crown to grant interests in native title lands. The 1882 grant of a fee simple that was made under the purported authority of the statute therefore should have been invalid.<sup>44</sup>

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<sup>39</sup> See *supra* note 25.

<sup>40</sup> *Supra* note 1 at 217.

<sup>41</sup> *Ibid.*, esp. at 48, Brennan J.

<sup>42</sup> See McNeil, *supra* note 6 at 79-93.

<sup>43</sup> Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2d ed. (Cambridge: Cambridge University Press, 1898) vol. 2 at 3-4.

<sup>44</sup> Alternatively, even if the NTLA, *supra* note 36, did authorize the Crown to grant an interest in lands that were subject to an exclusive native title, the existence of that title should have prevented the grantee from obtaining a present possessory interest because the Crown did not have such an interest to give. This is due to the *nemo dat* rule. See *supra* note 25.

My conclusion that the NTLA did not authorize the Crown to grant lands that were subject to native title is supported by principles of statutory interpretation as well. We have already seen that the suggestion in *Mabo* and *Western Australia* that the common law permitted the Crown to infringe or extinguish native title by grant is inconsistent with well-established legal principle and precedent. But if the authority to do this is statutory, as was held in *Fejo*, then the statute should meet the requirement of clear and plain legislative intent to give the Crown the power to infringe or extinguish vested rights.<sup>45</sup> To try to derive such authority from a definition section of the NTLA that was no doubt intended to clarify what lands of the Crown could be granted under authority of the Act requires stretching principles of statutory interpretation to the breaking point.<sup>46</sup>

In my opinion, the High Court's failure in *Fejo* to even address the issue of how a statute can implicitly authorize extinguishment of vested land rights through a definition section is symptomatic of the weakness of the Court's analysis of the whole extinguishment issue. If anything, *Fejo* represents an even more disturbing abdication of judicial responsibility than *Mabo* in this respect, because in *Mabo*, Justice Brennan at least attempted to offer some explanation, however weak, for the power of the Crown to extinguish native title by grant. This judicial failure to adequately explain the Court's position on such a fundamental issue suggests to me that the real reasons behind the position are not legal at all—they are political and economic.<sup>47</sup> We will come back to this point in the final part of this article, after examining how the Supreme Court of Canada has so far dealt with the issue of infringement of Aboriginal title.

The High Court revisited the extinguishment issue in its recent decision in *Western Australia v. Ward*,<sup>48</sup> which involved an application to the Federal Court for a determination of native title in the East Kimberley region in Western Australia and the Northern Territory. In *Ward*, the High Court deftly attempted to avoid the problems revealed in its earlier pronouncements

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<sup>45</sup> See *supra* note 15 and accompanying text.

<sup>46</sup> Besides the principle that statutes should not be interpreted as authorizing interference with vested rights unless the intention to confer that authority is unequivocal, there is "the valuable rule never to enact under the guise of definition": S.G.G. Edgar, *Craies on Statute Law*, 7th ed. (London: Sweet and Maxwell, 1971) at 213.

<sup>47</sup> See "Racial Discrimination", *supra* note 5 at 219-20 (*Emerging Justice?* at 406-7); McNeil, *supra* note 8 at 369-70 (*Emerging Justice?* at 415).

<sup>48</sup> (2002), 191 A.L.R. 1 [*Ward*].

on the issue by relying on the *Native Title Act 1993*<sup>49</sup> and State and Territory legislation authorized by that Act. In their majority judgment, Chief Justice Gleeson and Justices Gaudron, Gummow, and Hayne (hereinafter referred to as the majority) said that the NTA lay “at the core of this litigation[.]” unlike in *Mabo*, *Wik*, and *Fejo*.<sup>50</sup> Accordingly, they emphasized that “... it is to the terms of the NTA that primary regard must be had, and not the decisions in *Mabo* [No 2] or *Wik*. The only present relevance of those decisions is for whatever light they cast on the NTA.”<sup>51</sup> This attempt to rely on the legislation tends to distort the analysis, in particular because it masks the fact that some of the NTA’s key provisions relating to extinguishment cannot be applied without resorting to the common law, as expressed in those earlier decisions.

Admittedly, the NTA provides in s. 11(1) that “[n]ative title is not able to be extinguished contrary to this Act.”<sup>52</sup> The 1998 amendments confirmed that Crown grants made by the Commonwealth extinguished native title if they were valid and were “previous *exclusive* possession acts,” as defined by the amendments.<sup>53</sup> But for those grants to be valid when issued, the Crown would have had to have the authority to make them, which, as we have seen, was the very issue the Court failed to address adequately in its earlier decisions on native title.<sup>54</sup> The amendments also provide that a valid Commonwealth grant

<sup>49</sup> (Cth.) [NTA], as am. by *Native Title Amendment Act 1998* (Cth.). For detailed discussion of the amendments and their effect, see Richard H. Bartlett, *Native Title in Australia*, 2nd ed. (Chatswood, N.S.W.: LexisNexis Butterworths, 2004).

<sup>50</sup> *Ward*, *supra* note 48 at 12. Kirby J. wrote a judgment concurring in result, but nonetheless differing from the majority on some issues relating to the content of native title and extinguishment. Callinan J. wrote a lengthy dissent, in which he took a harder line on extinguishment than the majority (e.g., he distinguished *Wik*, *supra* note 14, and expressed the view that pastoral leases in Western Australia and the Northern Territory extinguished native title completely). McHugh J. agreed with Callinan J.’s conclusions, as well as with his reasons (with one exception: see *Ward*, *ibid.* at 135, 156).

<sup>51</sup> *Ward*, *ibid.* at 19. Compare Kirby J.’s judgment at 164 (“the test for extinguishment must begin with the NTA, although, as that Act itself provides, the common law retains a role”). See also Callinan J.’s dissenting opinion at 179-182, 195 (“Because so much of the language of the Native Title Act has its genesis in the judgment of Brennan J in *Mabo* [No 2], resort to that case continues to be useful and, indeed, necessary”).

<sup>52</sup> *Supra* note 49.

<sup>53</sup> *Ibid.*, ss. 23B, 23C. Note, however, that some of the grants defined as previous exclusive possession acts in s.23B might not have conferred exclusive possession on their own, in which case they would not have extinguished native title without the 1998 amendments to the NTA. Note also that s.23E provides that a law of a State or Territory can likewise confirm extinguishment by grants of exclusive possession interests made by the State or Territory on or before December 23, 1996. For application of these provisions in New South Wales, see *Anderson*, *supra* note 15, decided the same day as *Ward*, *supra* note 48.

<sup>54</sup> See *supra* notes 7-47 and accompanying text. In *Ward*, *supra* note 48, the majority appears to have thought that the issue of validity in this context depended, at least in part, on whether the grant had been made before or after the *Racial Discrimination Act 1975* (Cth.) [RDA] came into force. See

of a *non-exclusive* agricultural or pastoral lease made on or before December 23, 1996, extinguishes native title rights and interests to the extent that they are inconsistent with the rights and interests of the grantee “if, *apart from this Act*, the act [grant] extinguishes the native title rights and interests”; otherwise, the native title rights and interests are merely suspended for the duration of the lease.<sup>55</sup> Clearly, this must mean that the grant of a non-exclusive agricultural or pastoral lease, if valid, could result in partial extinguishment of native title only if that would have occurred apart from the NTA, which once again takes us back to the common law and earlier legislation.<sup>56</sup> Moreover, this interpretation was confirmed in *Ward*, where the majority said that the valid grant of non-exclusive pastoral leases by the State of Western Australia involved

the grant of rights and interests inconsistent with so much of the native title rights and interests as stipulated for control of access to the land the subject of the grants. The pastoral leases were

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*Ward* at 68, where the majority said in reference to the pastoral leases under consideration that “[t]hey were granted before the RDA commenced and there is, therefore, no question about their validity.” See also *Anderson*, *supra* note 15 at 328, where Gaudron, Gummow and Hayne JJ. added that an act could be valid within the meaning of this subsection if it was a “past act” made after the commencement of the RDA that had been validated by the NTA or corresponding State legislation.

<sup>55</sup> NTA, *supra* note 49, s.23G(1)(b) [emphasis added] (for apparent disapproval of the distinction this subsection makes between extinguishment and suspension, see *Ward*, *supra* note 48 at 281 n.1062, Callinan J., dissenting). S.23I provides that a law of a State or Territory can give the same effect to non-exclusive agricultural or pastoral leases granted by the State or Territory.

<sup>56</sup> See Bartlett, *supra* note 49 at [17.5]. The NTA, *supra* note 49, s.23A(3) nonetheless provides: “If the acts were ‘previous non-exclusive possession acts’ (involving grants of non-exclusive agricultural leases or non-exclusive pastoral leases), they will have extinguished native title to the extent of any inconsistency.” Taken alone, this subsection suggests that the 1998 amendments were intended to bring about partial extinguishment of native title by non-exclusive agricultural and pastoral leases. However, s.23A is just a summary of Div. 2B of the Act that was drafted before s.23G was rewritten (as part of a compromise reached with Senator Brian Harradine in exchange for his support of the Bill amending the Act) and the words “apart from this Act” were added. Compare s.23G of the NTA with the version of that section in the *Native Title Amendment Bill 1997* (Cth.) (note also that the original wording of the heading to s.23G, “Confirmation of partial extinguishment of native title by previous non-exclusive possession acts of Commonwealth,” was retained, possibly adding to the confusion, despite the fact that the *Acts Interpretation Act 1901* (Cth.), s.13(3), provides that “no heading to a section of an Act, shall be taken to be part of the Act”). When ss. 23A and 23G, as enacted, are read together, it is apparent that these leases only extinguished native title rights and interests if that would have occurred apart from the NTA (or corresponding State or Territory Acts). For confirmation that this was the intention, see Senator Harradine’s speech, Austl., Commonwealth, Senate, *Parliamentary Debates* (8 July 1998) at 5196: “There is the question of extinguishment when rights are determined between pastoral leaseholders and native title holders or claimants. Of course, in accordance with the *Wik* decision, the former takes precedence over the latter. It was proposed in the legislation that those interests be extinguished. *This bill does not extinguish them; it simply suspends them until the lease ceases, runs out. We have left to the common law the decision as to what occurs then.* Hopefully, the common law will determine that they are to be revived” [emphasis added]. I am grateful to David Yarrow for bringing the legislative history of Div. 2B and Senator Harradine’s speech to my attention.

acts attributable to the state which denied to the native title holders the continuation of a traditional right to say who could or who could not come onto the land in question. *That consequence flowed apart from the provisions of the State Validation Act.* It followed that to that extent the grants of pastoral leases extinguished native title rights and interests within the meaning of para (b)(i) of s 12M(1) [of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (W.A.), referred to in the judgment as the *State Validation Act*].<sup>57</sup>

As the provision in the *State Validation Act* referred to in this passage replicates (with the substitution of “State” for “Commonwealth”) the 1998 amendments to the NTA relating to non-exclusive agricultural and pastoral leases,<sup>58</sup> the Court’s interpretation of that provision applies equally to the equivalent provision in the amendments. The majority’s conclusion that “[t]hat consequence flowed apart from the provisions of the State Validation Act” meant that the “apart from this Act” requirement had been fulfilled, leading the judges to conclude that the provision in question applied and that native title rights and interests had been extinguished to the extent of their legal inconsistency with the rights and interests of the pastoral leaseholders.

Given the wording of this statutory provision and the majority’s application of it, it would be misleading to say that it is the legislation that brings about partial extinguishment of native title where a non-exclusive pastoral lease is concerned. In reality, the provision only confirms such extinguishment if that would have occurred anyway (“apart from this Act”), either by virtue of the common law or earlier valid statutory authority. The majority’s decision nonetheless gives the impression that partial extinguishment of native title in this context is due to this provision in the NTA and the corresponding State and Territory legislation. As mentioned earlier, the issue of whether a non-exclusive pastoral lease partially extinguished or merely suspended native title rights and interests had been left open in *Wik*.<sup>59</sup> In the appeal from the Federal Court decision in *Ward*, the Full Court dealt extensively with this issue, with Justice Beaumont and Justice von Doussa ruling in favour of partial extinguishment, and Justice North (dissenting in this regard) opting for suspension.<sup>60</sup> But the majority of the High Court begged this question by declaring that the 1998 amendments to the NTA, together with

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<sup>57</sup> *Supra* note 48 at 68 [emphasis added].

<sup>58</sup> As we have seen, provision for State legislation to this effect was made by the 1998 amendments to the NTA. See *supra* note 55.

<sup>59</sup> See *supra* note 33 and accompanying text.

<sup>60</sup> *Western Australia v. Ward* (2000), 170 A.L.R. 159. The Full Court held that the Western Australia *State Validation Act* did not apply because it came into force after the hearing at first instance by the Federal Court, but the High Court overruled this aspect of the Full Court’s decision on the ground that an “appeal to the Full Court of the Federal Court is not an appeal in the strict sense”: *Ward*, *supra* note 48 at 34. This ruling allowed the High Court to rely on that Act. See text accompanying *supra* note 58.



corresponding State and Territory legislation, “mandate” partial extinguishment of native title by non-exclusive pastoral leases.<sup>61</sup> How can that be, when the provision in question expressly limits partial extinguishment to situations where that would have occurred “apart from this Act”? And if the provision *mandated* partial extinguishment, why did the majority bother to conclude that denial of native title rights to control access to the land was a consequence flowing from the grants of non-exclusive pastoral leases themselves, rather than from the legislation?<sup>62</sup> There is a logical inconsistency here, which apparently led the majority—because they regarded the NTA as mandating the partial extinguishment of native title by non-exclusive pastoral leases—to think it unnecessary to explain how that extinguishment could have occurred independently of the Act. By this maneuver, they were able to come down in favour of partial extinguishment rather than suspension without even entering into the debate that had been the centre of attention when the case was before the Full Court.<sup>63</sup>

Despite what the majority said about the NTA governing the outcome in the *Ward* case, it is apparent that the judges were in fact guided by the extinguishment-by-grant doctrine that had been laid down by Justice Brennan

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<sup>61</sup> *Ward*, *supra* note 48 at 14, 35. The majority did this by deciding, as had the Court in *Wik* and the majority of the Full Court in *Ward*, that the test for inconsistency between the rights and interests of native titleholders and those of grantees of the Crown is legal, not factual (*ibid.* at 35-37). If legal inconsistency were found, the majority of the High Court thought the NTA and corresponding State and Territory legislation would then apply to mandate extinguishment to the extent of the inconsistency. See note 63 below.

<sup>62</sup> See quotation accompanying *Ward*, *supra* note 57. That the majority meant that the grant of these pastoral leases had *extinguished* any native title right to control access, independently of the NTA and *State Validation Act*, is revealed even more clearly in the part of the judgment dealing with partial extinguishment in the Northern Territory, where the majority said this: “The [native title] right to be asked permission to use or have access to the land was inconsistent with the rights asserted under the various pastoral leases. Therefore, *independently of any operation of the Territory Validation Act [Validation (Native Title) Act 1994 (N.T.)], the consecutive pre-RDA grants of pastoral leases extinguished this native title right.* Paragraph (a) of s.9M(1) [equivalent to s.12M(1)(b)(i) of the *State Validation Act*] of the Territory Validation Act thus was attracted and the relevant native title right extinguished” (*Ward*, *supra* note 48 at 122) [emphasis added]. The confirmatory nature of the statutory provision is evident in this passage: rights that were previously extinguished are declared by the provision to be extinguished. See also *Anderson*, *supra* note 15 at 351, Kirby J., dissenting.

<sup>63</sup> See *Ward*, *supra* note 48 at 35, where the majority said: “The NTA, particularly in the distinction now drawn in s.23A, referred to above, between complete extinguishment and extinguishment ‘to the extent of any inconsistency’, mandates the correctness of the approach taken by [the majority of] the Full Court.” However, as we have seen, the general words of s.23A have been restricted by the more specific wording of s.23G. See *supra* note 56. Note too that the issue of whether partial extinguishment is effected by the NTA or caused by the original Crown grant could be of considerable practical importance for another reason as well, as compensation should be payable if the NTA is responsible for the extinguishment. See NTA, *supra* note 49, s.23J, and Callinan J.’s observations in *Ward*, *supra* note 48 at 181-82. In *Ward*, compensation was not a live issue. See the majority judgment at 15. See also *Anderson*, *supra* note 15 at 327-28, and note 74 below.

in *Mabo* and relied upon in subsequent decisions like *Wik* and *Fejo*.<sup>64</sup> But what I find even more troubling about *Ward* is the way the majority resolved the partial extinguishment issue without even addressing it. Unfortunately, as this article has attempted to show, this kind of avoidance of fundamental issues has been typical of the High Court's approach to extinguishment ever since *Mabo*.

## II. *DELGAMUUKW* AND OTHER SUPREME COURT DECISIONS

The history of recognition of Indigenous land rights in Canada has been very different from the pre-*Mabo* history of denial in Australia. While the existence of these rights under the French regime is still a matter of debate,<sup>65</sup> Aboriginal title (as Indigenous title to land is generally called in Canada) has been acknowledged through Crown practice, including the *Royal Proclamation of 1763*<sup>66</sup> and the Indian treaties.<sup>67</sup> Historically, however, this acknowledgement took place mainly in what are now Ontario and the Prairie Provinces.<sup>68</sup> In British Columbia, apart from the portions of Vancouver Island that were covered by the Douglas Treaties in the 1850s and the north-eastern corner of the province that was included in Treaty 8 in 1899 and subsequent adhesions, the provincial denial of Aboriginal title was not unlike the denial

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<sup>64</sup> See e.g. *Ward*, *supra* note 48 at 39: "Reference was made in *Mabo* [No 2] to the inherent fragility of native title. One of the principal purposes of the NTA was to provide that native title is not able to be extinguished contrary to the Act. An important reason to conclude that, *before the NTA*, native title was inherently fragile is to be found in this core [Indigenous] concept of a right to be asked permission and to speak for country. The assertion of sovereignty marked the imposition of a new source of authority over the land. Upon that authority being exercised, by the creation or assertion of rights to control access to land, the right to be asked for permission to use or have access to the land was inevitably confined, if not excluded" [footnote omitted, emphasis added]. Moreover, the majority concluded that grants of pastoral leases made prior to the RDA, 1975, were valid, no doubt on the basis of *Wik*. See *supra* note 54. The majority judges apparently reached this conclusion because they assumed, as had the Court in *Fejo* (see *supra* notes 36-46 and accompanying text), that the statutory terms "waste lands" and "Crown lands" included lands subject to native title: *Ward*, *supra* note 48 at 57-61, 66. See also *Anderson*, *supra* note 15.

<sup>65</sup> See *R. v. Côté*, [1996] 3 S.C.R. 139 at 168-73.

<sup>66</sup> Reproduced in R.S.C. 1985, App. II, No. 1. For detailed analysis, see Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (D. Phil. Thesis, Oxford University, 1979), reprinted (Saskatoon: University of Saskatchewan Native Law Centre, 1979).

<sup>67</sup> See e.g. The Hon. Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke and Co., 1880).

<sup>68</sup> See Peter A. Cumming & Neil H. Mickenberg, eds., *Native Rights in Canada*, 2d ed. (Toronto: The Indian-Eskimo Association of Canada, 1972), esp. at 65-132, 171-93.

that prevailed for so long in Australia.<sup>69</sup>

It is therefore not surprising that most of the leading cases that have led to judicial recognition of the concept of Aboriginal title in Canada originated in British Columbia.<sup>70</sup> The most important of these cases is undoubtedly the *Delgamuukw* decision,<sup>71</sup> delivered by the Supreme Court of Canada in 1997. In *Delgamuukw* the Court defined Aboriginal title for the first time as a *sui generis* form of property that includes a right of exclusive use and occupation for a variety of purposes that are not limited to the uses that the Aboriginal titleholders made of their lands in the past.<sup>72</sup> As Aboriginal title is included under the rubric of the "Aboriginal rights" that were "recognized and affirmed" by section 35(1) of the *Constitution Act, 1982*,<sup>73</sup> this means that, unlike native title in Australia,<sup>74</sup> Aboriginal title in Canada is constitutionally protected against both legislative and executive action, whether federal or provincial.

Prior to receiving this constitutional protection in 1982, Aboriginal title would no doubt have been generally subject to federal legislative infringement and extinguishment, as long as Parliament's intention to infringe

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<sup>69</sup> See Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990).

<sup>70</sup> See e.g. *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Guerin v. The Queen*, [1984] 2 S.C.R. 335. Prior to the *Calder* decision, the leading case was *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46 (P.C.), a Privy Council decision originating from Ontario. However, that decision was based more on the *Royal Proclamation of 1763* than on Aboriginal title, in regard to both the source and content of Indigenous land rights. See Kent McNeil, "The Meaning of Aboriginal Title" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 135. Note too that on 29 April 2004, the Supreme Court granted leave to appeal in two cases from the Maritime Provinces involving Aboriginal title: *R. v. Bernard*, [2003] 4 C.N.L.R. 48 (N.B.C.A.), and *R. v. Marshall*, [2004] 1 C.N.L.R. 211 (N.S.C.A.).

<sup>71</sup> *Supra* note 2.

<sup>72</sup> *Ibid.* at 1083, Lamer C.J.C. (Cory and Major JJ. concurring). La Forest J. delivered a separate judgment for himself and L'Heureux-Dubé J., in which they arrived at the same result as the majority (the case was sent back to trial for application of the principles the Court laid down), but differed somewhat on the definition of Aboriginal title. McLachlin J., at 1135, concurred with Lamer C.J.C. and added that she was also in "substantial agreement" with La Forest J.

<sup>73</sup> *Supra* note 3.

<sup>74</sup> In Australia, Commonwealth statutes, namely the *Racial Discrimination Act 1975* and the *Native Title Act 1993*, provide native title with some protection against State interference, but this is due to the division of powers and the paramountcy of Commonwealth laws. In addition, s.51(xxxi) of the *Australian Constitution* (contained in s.9 of the *Commonwealth of Australia Constitution Act, 1900* (U.K.), 63 & 64 Vict., c.12), provides that any acquisition of private property through Commonwealth legislation has to be on "just terms," a provision that no doubt applies to native title. See *Mabo*, *supra* note 1 at 111, Deane & Gaudron JJ. But native title is not entrenched in the Constitution in the sense that Aboriginal title is in Canada.

or extinguish it was clear and plain.<sup>75</sup> While constitutional entrenchment of Aboriginal rights in 1982 has provided Aboriginal title with protection against extinguishment, it can still be infringed by or pursuant to federal legislation as long as the infringement is justified under the *Sparrow* test (to be discussed below).<sup>76</sup>

Ever since Confederation, however, provincial legislatures have lacked the constitutional authority to *extinguish* Aboriginal title, as it comes within the core of federal jurisdiction over "Indians, and Lands reserved for the Indians,"<sup>77</sup> and so is protected by the doctrine of interjurisdictional immunity.<sup>78</sup> However, for reasons that remain unexplained, the Supreme Court opined in *Delgamuukw* that, after Confederation, Aboriginal title could still be *infringed* by or pursuant to provincial legislation. Moreover, this provincial authority of infringement continued even after Aboriginal and treaty rights received constitutional protection in 1982, subject of course to the requirement that any such infringement would henceforth have to meet the justification test laid down in *Sparrow*.<sup>79</sup>

Leaving aside the serious division-of-powers problems presented by provincial authority to infringe Aboriginal title,<sup>80</sup> I am going to concentrate on the Supreme Court's application of the justification test to the general

<sup>75</sup> This is due to the general rule of Anglo-Canadian constitutional law, based on parliamentary sovereignty, that a legislature acting within its constitutional jurisdiction can infringe or extinguish private rights, including property rights, as long as the intention to do so is unequivocal. See *Western Counties Railway Co. v. Windsor and Annapolis Railway Co.* (1882), 7 App. Cas. 178 at 188 (P.C.); and *Central Control Board (Liquor Traffic) v. Cannon Brewery Company, Limited*, [1919] A.C. 744 at 752 (H.L.), Lord Atkinson. Note, however, that Aboriginal title may have already been protected in some parts of Canada by constitutional instruments, such as the *Rupert's Land and North-Western Territory Order*, 1870, reproduced in R.S.C. 1985, App. II, No. 9. See Kent McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982).

<sup>76</sup> In *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 538 [*Van der Peet*], Lamer C.J.C. said: "Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*" (*supra* note 23). See also *Delgamuukw*, *supra* note 2 at 1107-14, Lamer C.J.C.; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at 927, McLachlin C.J.C. [*Mitchell*].

<sup>77</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, s.91(24).

<sup>78</sup> *Delgamuukw*, *supra* note 2 at 1116-21, Lamer C.J.C.

<sup>79</sup> *Supra* note 23. See *Delgamuukw*, *supra* note 2 at 1107, Lamer C.J.C.

<sup>80</sup> For detailed discussion of these problems, see Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. L. Rev. 431, reprinted in *Emerging Justice?*, *supra* note 5 at 249, and "Aboriginal Title and Section 88 of the *Indian Act*" (2000) 34 U.B.C. L. Rev. 159; Nigel Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317; and Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dal. L.J. 185, and "'Still Crazy After All These Years': Section 88 of the *Indian Act* at Fifty" (2000) 38 Alta. L. Rev. 458.

legislative infringement of Aboriginal title. According to the *Sparrow* decision, once Aboriginal people prove a *prima facie* infringement of an Aboriginal right (in that case it was a right to fish for food and ceremonial purposes), the onus is on the Crown to justify the infringement. This involves a two-step process: first, the Crown has to prove that the infringement is pursuant to a valid legislative objective; and second, the Crown has to show that it has respected its fiduciary obligations to the Aboriginal people in question. If the Crown fails to meet either of these requirements, the infringement will be invalid and the offending legislation will be inapplicable to the extent that it infringes the Aboriginal right.

Looking at the requirement of a valid legislative objective first, in *Sparrow* the Supreme Court found conservation of fish stocks to be a valid objective because, in the words of Chief Justice Dickson and Justice La Forest, who wrote the unanimous judgment, it is "aimed at preserving s. 35(1) rights by conserving and managing a natural resource."<sup>81</sup> More generally, the Court was of the view that "objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial," would be valid.<sup>82</sup> The Court rejected the argument that the "public interest" would be a sufficient objective, as it is "so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."<sup>83</sup>

Turning to the requirement that the Crown's fiduciary obligations to the Aboriginal peoples be respected, the Court in *Sparrow* held that this meant in part that Aboriginal rights, given their constitutional status, have to be given priority over other rights and interests. In the context of the fishery, this meant that, after the needs of conservation had been taken into account, the Aboriginal food fishery had to be given complete priority over commercial and sports fishing. In practice, the effect of this would be that

[i]f, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right.<sup>84</sup>

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<sup>81</sup> *Supra* note 23 at 1113.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* at 1116.

The Supreme Court revisited the justification test in *R. v. Gladstone*.<sup>85</sup> After deciding that the Heiltsuk Nation had an Aboriginal right to take and exchange herring spawn on kelp in commercial quantities and that infringement had been shown, Chief Justice Lamer for the majority examined the question of how the priority approach taken in *Sparrow* would apply in the context of a commercial Aboriginal right. Backpedalling from *Sparrow*, Chief Justice Lamer held that priority could not be allocated in the same way in *Gladstone* because a right to fish commercially is not restricted by the kind of inherent limit that is built into a right to fish for food, namely the appetite of the Aboriginal people in question for fish. As the only limits on a commercial right to fish are the availability of the resource and the market, Chief Justice Lamer feared that this right might, in effect, become exclusive.<sup>86</sup> In his view, that was not what the Court in *Sparrow* had in mind when it assigned priority to an Aboriginal right to fish. So while an Aboriginal right to fish commercially still has to be given some priority over other commercial and sports fishing, in allocating the resource after conservation needs have been met the federal government is entitled to take into account "economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups."<sup>87</sup> Chief Justice Lamer regarded concern for these third party interests as falling within the compelling and substantial objectives that would meet the first part of the *Sparrow* justification test because, "[i]n the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment."<sup>88</sup>

Chief Justice Lamer's explanation for redefining the priority to be

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<sup>85</sup> [1996] 2 S.C.R. 723 [*Gladstone*]. For further insight into this case, see Douglas C. Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery" (2000) 34 U.B.C. L. Rev. 195.

<sup>86</sup> While Lamer C.J.C. might have addressed this concern by limiting the exercise of the right to the geographical area where the Heiltsuk people traditionally fished, there is no discussion of that possibility in his judgment. See Harris, *ibid.* at 229-31. Compare *Commonwealth v. Yarmirr* (1999), 168 A.L.R. 426 (Full F.C.), where Merkel J., dissenting, envisaged exclusive fisheries in geographically limited areas of the territorial sea. On appeal, the High Court of Australia dismissed this possibility by holding that exclusive native title rights in the territorial sea are inconsistent with the public rights of navigation and fishing, and with the international right of innocent passage: *Commonwealth v. Yarmirr* (2001), 184 A.L.R. 113 at 144-45. See also *Ward*, *supra* note 48 at 114. For discussion of the relationship between Aboriginal and public fishing rights, see Mark D. Walters, "Aboriginal Rights, *Magna Carta* and Exclusive Rights to Fisheries in the Waters of Upper Canada" (1998) 23 Queen's L.J. 301.

<sup>87</sup> *Gladstone*, *supra* note 85 at 775. See also *R. v. Marshall [No. 1]*, [1999] 3 S.C.R. 456, and *R. v. Marshall [No. 2]*, [1999] 3 S.C.R. 533, where the Supreme Court took the same kind of approach to a treaty right to fish for a moderate livelihood (a right that does, however, have an inherent limit).

<sup>88</sup> *Gladstone*, *ibid.* [emphasis in original].

accorded to commercial Aboriginal rights sounds suspiciously like the “public interest” rationale that was rejected in *Sparrow*.<sup>89</sup> As Justice McLachlin (as she then was) pointed out in her vigorous dissent on this issue of justification in the *Van der Peet* case, Chief Justice Lamer’s approach “runs counter to the authorities,” and “is indeterminate and ultimately more political than legal.”<sup>90</sup> In her view, the legislative objectives that the Court in *Sparrow* regarded as sufficiently compelling and substantial to justify infringements of Aboriginal rights were objectives relating to “the responsible exercise of the right,” such as conservation and safety, not things like economic and regional fairness and the interests of third parties.<sup>91</sup> She was also concerned that the Chief Justice’s approach did not respect the Canadian tradition of accommodating Aboriginal rights through just settlements arrived at by means of negotiated treaties. Instead, she said that his approach came down to this:

In certain circumstances, aboriginals may be required to share their fishing rights with non-aboriginals in order to effect a reconciliation of aboriginal and non-aboriginal interests. In other words, the Crown may convey a portion of an aboriginal fishing right to others, not by treaty or with the consent of the aboriginal people, but by its own unilateral act. I earlier suggested that this has the potential to violate the Crown’s fiduciary duty to safeguard aboriginal rights and property. But my concern is more fundamental. How, without amending the Constitution, can the Crown cut down the aboriginal right? ... To reallocate the benefit of the right from aboriginals to non-aboriginals would be to diminish the substance of the right that s.35(1) of the *Constitution Act, 1982* guarantees to the aboriginal people. This no court can do.<sup>92</sup>

Justice McLachlin thus drew a distinction between justifiable *limitations on the exercise* of an Aboriginal right and *diminution* of the right itself. In property law terms, this is equivalent to the distinction between regulation and expropriation. The latter need not involve a complete taking, as even partial appropriation of an owner’s rights can amount to expropriation.<sup>93</sup> We therefore need to ask how Chief Justice Lamer was able to reconcile his statement in *Van der Peet* that section 35(1) protects Aboriginal rights against extinguishment<sup>94</sup> with his holding in *Gladstone* that an Aboriginal fishing right can be limited by allocation of part of the available

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<sup>89</sup> For further discussion, see Kent McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?” *Constitutional Forum* 8:2 (Winter 1997) 33, reprinted in *Emerging Justice?*, *supra* note 5 at 281.

<sup>90</sup> *Supra* note 76 at 659.

<sup>91</sup> *Ibid.* at 660-61.

<sup>92</sup> *Ibid.* at 667.

<sup>93</sup> See *The Queen (B.C.) v. Tener*, [1985] 1 S.C.R. 533 [*Tener*], where it was held that preventing an owner of a profit à prendre from extracting the minerals to which the profit related amounted to a form of expropriation.

<sup>94</sup> See *supra* note 76.

resource to third parties. Was he of the view that limiting an Aboriginal fishing right in this way would not amount to even a partial extinguishment, perhaps because the limitation could vary from year to year? Or did he think a *complete* extinguishment of an Aboriginal right is impermissible, but *partial* extinguishment can be justified in appropriate circumstances? His judgment in *Gladstone* does not tell us.

It might be argued that the commercial fishing right established in *Gladstone* was not proprietary,<sup>95</sup> and so the analogy I have drawn between partial extinguishment of that right and expropriation of property is not apposite.<sup>96</sup> But even assuming this to be so, one cannot distinguish extinguishment from expropriation in this way where Aboriginal title to land is concerned. Given that Aboriginal title is proprietary,<sup>97</sup> even a partial taking of it should amount to much the same thing as expropriation.

In *Delgamuukw*, Chief Justice Lamer reviewed the articulation of the justification test in *Sparrow* and *Gladstone*, and then explained how the test would apply in the context of an infringement of Aboriginal title. Referring to the first part of the test, that is the requirement that the Crown prove a valid legislative objective, he said that in most cases a valid objective will be one that "can be traced to the *reconciliation* of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty."<sup>98</sup> He elaborated as follows:

In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.<sup>99</sup>

The fact that most of the objectives Chief Justice Lamer listed generally come within provincial jurisdiction raises a fundamental division-of-powers issue because Aboriginal title is within the core of federal jurisdiction over "Indians, and Lands reserved for Indians," and so should be protected from provincial

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<sup>95</sup> See *Sparrow*, *supra* note 23 at 1112, where Dickson C.J.C. and La Forest J. said, in the context of an Aboriginal right to fish for food, that "[f]ishing rights are not traditional property rights."

<sup>96</sup> However, in *ibid.* at 1119, the Court did envisage the possibility of expropriation of an Aboriginal right in the context of its discussion of justification for infringement of an Aboriginal right to fish for food.

<sup>97</sup> See text accompanying *supra* note 72.

<sup>98</sup> *Delgamuukw*, *supra* note 2 at 1111 [emphasis in original].

<sup>99</sup> *Ibid.*



infringement by the constitutional doctrine of interjurisdictional immunity.<sup>100</sup> But leaving that issue aside, let us examine Chief Justice Lamer's list of valid objectives more closely.

At the risk of stating the obvious, it has to be kept in mind that, in providing this list, Chief Justice Lamer envisaged a situation where Aboriginal title had already been established and a *prima facie* infringement of that title had been shown.<sup>101</sup> He was therefore addressing the issue of whether the infringement could be justified. That said, we can divide his objectives into three categories:

(1) objectives that involve *regulation* of Aboriginal title for the good of the Aboriginal peoples themselves and Canadian society generally ("protection of the environment or endangered species");

(2) objectives that involve *expropriation* of Aboriginal title, in whole or in part, for *public* purposes ("the building of infrastructure", and possibly "the development of ... hydroelectric power");

(3) objectives that seem to involve the *transfer* of Aboriginal title, in whole or in part, from the Aboriginal titleholders to *private* individuals or corporations ("the development of agriculture, forestry, mining ... the general economic development of the interior of British Columbia ... and the settlement of foreign [non-Aboriginal?] populations to support those aims").

The first of these categories would appear to encompass the kind of compelling and substantial objectives that the Court had in mind in *Sparrow*, such as conservation. The objectives in the second category closely resemble the kinds of objectives that allow the Crown to expropriate private property, though it can only do so if it has unequivocal statutory authority.<sup>102</sup> Moreover, fair compensation must be paid unless expressly denied by the legislation.<sup>103</sup>

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<sup>100</sup> See text accompanying *supra* notes 77-79, and the articles referred to in *supra* note 80.

<sup>101</sup> See text following *supra* note 80.

<sup>102</sup> See *Rugby Water Board v. Shaw Fox*, [1973] A.C. 202 at 214 (H.L.), Lord Pearson; Broom, *supra* note 10 at 231; Keith Davies, *Law of Compulsory Purchase and Compensation*, 3d ed. (London: Butterworths, 1978) at 9-10; and Graham L. Fricke, ed., *Compulsory Acquisition of Land in Australia*, 2d ed. (Sydney: The Law Book Company, 1982) at 5-6.

<sup>103</sup> See *De Keyser's Royal Hotel*, *supra* note 11 at 542, Lord Atkinson; *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101; *Tener*, *supra* note 93 at 547 (Wilson J.), 559 (Estey J.); *Rock Resources Inc. v. British Columbia* (2003), 229 D.L.R. (4th) 115 (B.C. C.A.), leave to appeal to S.C.C. refused 8 April 2004. In *Sparrow*, *supra* note 23 at 1119, the Court expressed the view that fair compensation would be payable in the event that an Aboriginal right was expropriated. See also *Delgamuukw*, *supra* note 2 at 1113-14, Lamer C.J.C.

But even more importantly for present purposes, statutory authority of this kind generally only permits expropriation for public purposes, such as roads and airports.<sup>104</sup> I am not aware of any expropriation legislation in Canada that would empower the Crown to take property under the guise of expropriation for the purpose of transferring it to other persons for a purpose like agriculture. And yet that is just what Chief Justice Lamer seems to have had in mind when he included the objectives I have placed in the third category in his list of potentially valid objectives. He said that the priority accorded to Aboriginal title in accordance with the *Gladstone* approach

might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of *aboriginal title lands*, that economic barriers to aboriginal uses of *their lands* (e.g., licensing fees) be somewhat reduced.<sup>105</sup>

So the Chief Justice evidently thought that it could be justifiable for the Crown to grant fee simple interests in Aboriginal title lands to private persons for agricultural purposes, or to provide corporations with leases or licences to exploit the forest and mineral resources on those lands. But if the Aboriginal peoples wanted to exploit the natural resources on their own lands themselves, apparently they would have to pay licensing fees, which might be “somewhat reduced” to encourage economic development.

With all due respect, from a property perspective this aspect of Chief Justice Lamer’s judgment borders on the bizarre. Aboriginal title is not only a property right that includes the right of exclusive occupation and use—it is also a *constitutionally protected property right*.<sup>106</sup> And yet the Crown might be able to infringe it by granting the land to third parties for agriculture, for example, because, “in principle,” this is a compelling and substantial purpose that might justify the infringement. Chief Justice Lamer seems to have thought this could be explained because Aboriginal title is exclusive, and so the *Gladstone* approach to priority should apply to it. In other words, because it is exclusive the priority to be accorded to it is not the *Sparrow* kind of

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<sup>104</sup> On what constitutes a public purpose, see *The King v. O’Halloran*, [1934] Ex. C.R. 67; *Vaughan Construction Co. v. Nova Scotia (Attorney-General)* (1967), 60 D.L.R. (2d) 692 (N.S. S.C.); *Thompson v. R.*, [1978] 5 W.W.R. 635 (Man. Q.B.); *Pineridge Property Ltd. v. District 57 Board of School Trustees* (1982), 40 B.C.L.R. 221 (Co. Ct.); *Grauer Estate v. Canada* (1986), 1 F.T.R. 51; and *Piccirillo v. British Columbia (Minister of Forests and Lands)* (1988), 47 D.L.R. (4th) 513 (B.C. S.C.).

<sup>105</sup> *Delgamuukw*, *supra* note 2 at 1112 [emphasis added].

<sup>106</sup> For further discussion, see Kent McNeil, “Aboriginal Title as a Constitutionally Protected Property Right” in Owen Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court’s Delgamuukw Decision* (Vancouver: The Fraser Institute, 2000) 55, reprinted in *Emerging Justice?*, *supra* note 5 at 292.

complete priority, but the less generous priority that allowed the Crown in *Gladstone* to allocate part of the herring spawn harvest to other users of the resource.<sup>107</sup>

So for Chief Justice Lamer, it seems that Aboriginal title to land can be equated with the Heiltsuk's Aboriginal right to gather and sell herring spawn in commercial quantities. But unlike Aboriginal title to land, the Aboriginal right established in *Gladstone* does not appear to have amounted to a property right in the herring spawn itself before it was gathered. Nor was the right to take it exclusive, in the way that an Aboriginal title right to occupy and use land is exclusive.<sup>108</sup> If the *Gladstone* case involved a property interest, the subject matter of it was a non-exclusive right to take herring spawn in commercial quantities, not the herring spawn itself. To prevent that right from being exclusive *in practice*, Chief Justice Lamer modified the *Sparrow* approach to priority so that some of the not-yet-owned herring spawn could be allocated to other users. By applying the same approach to Aboriginal title land, Chief Justice Lamer apparently thought it was possible to accord Aboriginal titleholders exclusive rights to their land, but at the same time allow infringements that would eliminate that exclusivity by allowing the Crown to allocate some of their lands or the resources thereon to third parties. Through this convoluted reasoning, Aboriginal titleholders are enmeshed in a Catch-22 situation, whereby the very exclusivity of their rights results in virtually unrestricted Crown authority to infringe their title for objectives that go beyond regulation and even public purposes to the creation of third party interests.<sup>109</sup>

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<sup>107</sup> In *Delgamuukw*, *supra* note 2 at 1112, Lamer C.J.C. said this: "The exclusive nature of aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. For example, if the Crown's fiduciary duty requires that aboriginal title be given priority, then it is the altered approach to priority that I laid down in *Gladstone* which should apply."

<sup>108</sup> However, in Canada an exclusive fishing right should be possible if geographically limited. See *supra* note 86.

<sup>109</sup> See Gordon Christie, "Delgamuukw and the Protection of Aboriginal Land Interests" (2000-2001) 32 Ottawa L. Rev. 85. In practice, the most effective restriction on this power to infringe could be the obligation to pay compensation. See *Sparrow*, *supra* note 23 at 1119, and *Delgamuukw*, *supra* note 2 at 1113-14, Lamer C.J.C. The additional requirement that the Crown consult with Aboriginal titleholders with regard to infringements of their rights could provide some additional protection, though this "involvement of aboriginal peoples in decisions taken with respect to their lands" (*Delgamuukw*, *ibid.* at 1113) appears rather weak when compared with the kind of protections holders of non-constitutional real property enjoy against Crown interference. See McNeil, *supra* note 106. While the Crown's duties to consult and pay compensation will not be examined further in this article, additional discussion can be found in Sonia Lawrence & Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar Rev. 252; Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach* (Saskatoon: Purich, 2001); and Albert Peeling, "Delgamuukw and Compensation Issues," on-line: Delgamuukw Gisdaway National Process <<http://www.delgamuukw.org/research/compensation.htm>>.

Moreover, even if one accepts (which I obviously do not) that Aboriginal title can be justifiably infringed for the broad range of objectives that Chief Justice Lamer listed in *Delgamuukw*, we have seen that property rights can only be infringed by or pursuant to unequivocal statutory authority.<sup>110</sup> It is not enough, therefore, for the Crown to meet the justification test for an infringement of Aboriginal title to be valid. As a prerequisite, the Crown first has to be able to point to a statutory provision authorizing it to infringe Aboriginal title. Where, one might ask, is the statutory authority allowing the Crown to take land away from Aboriginal titleholders and grant it in fee simple to private persons for the purposes of agriculture? Where is the statutory authority to take away the rights Aboriginal titleholders have to the forests and minerals on and under their lands,<sup>111</sup> and transfer them to third parties by means of licences or leases? As in Australia, general legislation authorizing the Crown to grant interests in its own lands should not be interpreted as empowering the Crown to infringe vested property rights, including Aboriginal title rights.<sup>112</sup> And specific legislation aimed directly at Aboriginal title lands would not only be beyond provincial jurisdiction,<sup>113</sup> but would also be discriminatory.<sup>114</sup>

To conclude this discussion of the *Delgamuukw* decision, I think the Supreme Court's application of the justification test to Aboriginal title suffers from serious weaknesses. While *regulation* of Aboriginal title for such purposes as protection of the environment or endangered species is no doubt within the compelling and substantial purposes contemplated by the Court in *Sparrow*, *expropriation* of Aboriginal title land for public purposes is another matter. As Justice McLachlin pointed out in *Gladstone*, there is a qualitative difference between infringements that ensure the responsible exercise of a right, and infringements that reduce or take away the substance of the right. And even though temporary takings for public purposes might be justifiable in some instances,<sup>115</sup> such as national emergencies, expropriation amounting to permanent extinguishment of Aboriginal title would appear to be inconsistent with Chief Justice Lamer's statement in *Van der Peet* that "[s]ubsequent to s.

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<sup>110</sup> See *supra* notes 10-12 and accompanying text.

<sup>111</sup> In *Delgamuukw*, *supra* note 2 at 1084-88, Lamer C.J.C. held that natural resources such as minerals are included in the content of Aboriginal title.

<sup>112</sup> See *supra* notes 36-46 and accompanying text.

<sup>113</sup> See *Delgamuukw*, *supra* note 2 at 1116-19, Lamer C.J.C.

<sup>114</sup> See *Mabo v. Queensland [No. 1]* (1988) 166 C.L.R. 186 (H.C. Aust.); "Racial Discrimination", *supra* note 5, esp. at 216-19 (*Emerging Justice?* at 401-05).

<sup>115</sup> Some expropriation of Aboriginal rights was envisaged in *Sparrow*, *supra* note 23 at 1119.

35(1) aboriginal rights cannot be extinguished.”<sup>116</sup> Finally, infringement of Aboriginal title for the purpose of granting interests in lands to third parties for purposes like agriculture or resource extraction goes even further, as the benefit of this to the public is at best indirect. From a legal and constitutional perspective, it is therefore perplexing that the Supreme Court would have countenanced infringements of this third kind, especially as they seem to involve at least partial extinguishment of constitutionally protected rights. So as with the extinguishment-by-grant doctrine created by the High Court in *Mabo*, I think one has to look elsewhere for an explanation of the Supreme Court’s approach to justifiable infringement in *Delgamuukw*.

### III. POLITICAL AND ECONOMIC CONSIDERATIONS

Judges are obviously very reluctant to base their decisions expressly on political and economic considerations, as that might place their judicial objectivity in question and undermine the legitimacy of their judgments. They therefore attempt to support their decisions with the rhetoric of legal principle and precedent, as that puts them on more secure ground. But what if the conclusions they want to reach conflict with well-established authorities that are fundamental to the common law system? To overrule those authorities could, in Justice Brennan’s words in *Mabo*, “fracture a skeletal principle of our legal system.”<sup>117</sup> When faced with this dilemma, judges generally try to distinguish the situation before them from the context of the principle they feel obliged to preserve.

In my opinion, the judges in *Mabo* and *Delgamuukw* were presented with just this kind of dilemma. Legal principle and a sense of justice led them to decide that native or Aboriginal title is a real property interest that is recognized by the common law.<sup>118</sup> For this, they should be applauded. However, they were also faced with the reality that all private land rights in Australia, and most such rights in British Columbia, were created without any surrender of that title. If the Crown lacked the authority to create valid interests in lands that were subject to native or Aboriginal title, this could place these third party interests in jeopardy.

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<sup>116</sup> *Supra* note 76 at 538.

<sup>117</sup> *Supra* note 1 at 43, also at 29. Lamer C.J.C. echoed this in *Delgamuukw*, *supra* note 2 at 1066, when, quoting *Van der Peet*, *supra* note 76 at 550, he said that accommodation of Aboriginal perspectives “must be done in a manner which does not strain ‘the Canadian legal and constitutional structure.’”

<sup>118</sup> The justice element is more explicit in *Mabo*, *supra* note 1. See esp. at 40-43, Brennan J.; 104-09, Deane & Gaudron JJ. See also Jeremy Webber, “The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*” (1995) 17 Sydney L. Rev. 5.

As we have seen, the High Court of Australia's response to this situation was to create an exception to the well-established common law rule that the Crown cannot interfere with vested rights to land without unequivocal statutory authority.<sup>119</sup> That rule, according to the Court, applies only to real property interests that are themselves derived from a Crown grant.<sup>120</sup> As native title is not based on a Crown grant, it does not enjoy the protection against executive action that is accorded to other property interests. In this questionable way, the High Court was able to achieve its dual goals of recognizing native title and at the same time maintaining the validity of private interests in land. But given the weakness of the legal reasoning used to exclude native title from common law protection against the Crown, I have no doubt that the Court was motivated by political and economic, rather than legal, considerations.

The *Mabo* case itself contains hints to this effect. Justice Brennan, for example, stated that "[I]and in Australia which has been granted by the Crown is held on a tenure of some kind and *the titles acquired under the accepted land law cannot be disturbed*."<sup>121</sup> Even Justice Toohey, whose judgment in *Mabo* was perhaps the most favourable to Indigenous Australians, cautioned that "nothing in this judgment should be taken to suggest that the titles of those to whom land has been alienated by the Crown may now be disturbed."<sup>122</sup> But probably the clearest articulation of the political and economic nature of this aspect of the law of native title in Australia was provided by Justice Kirby in *Fejo*:

In the process of tracing the consequences which flow from *Mabo* (No. 2), two basic considerations, at least, restrain the disturbance of interests in land established by the law as previously understood. The first is that a court should not destroy or contradict an important and settled principle of the legal system. The second is that, in every society, rights in land which afford an enforceable entitlement to exclusive possession are *basic to social peace and the order as well as to economic investment and prosperity*. Any significant disturbance of such established rights is therefore, ordinarily, a matter for the legislature not the courts.<sup>123</sup>

So the High Court was willing to reassess the law to make room for the concept of native title because that would not upset any settled principles of

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<sup>119</sup> See *supra* notes 7-47 and accompanying text.

<sup>120</sup> One might ask whether this means that the decision in *Perry v. Clissold*, *supra* note 22, where the Privy Council held that the Crown had to respect the possessory title of an adverse possessor who obviously was not relying on a Crown grant, has been overruled in Australia.

<sup>121</sup> *Mabo*, *supra* note 1 at 47 [emphasis added].

<sup>122</sup> *Ibid.* at 196.

<sup>123</sup> *Supra* note 35 at 150 [footnotes omitted, emphasis added]. See also *Ward*, *supra* note 48 at 148-49 (McHugh J., dissenting), 279-81 (Callinan J., dissenting).

the common law system.<sup>124</sup> But it was not willing to disturb the *status quo* by undermining the validity of non-Indigenous property rights in Australia, even though this meant according those rights precedence over the land rights of Indigenous Australians for no good doctrinal reason.<sup>125</sup>

In Canada, the Supreme Court has not yet had to face this conflict between the land rights of the Aboriginal peoples and third party interests directly.<sup>126</sup> However, we have seen that in *Delgamuukw* the Court has prepared the way for giving precedence to private interests by providing the Crown with broad powers to infringe Aboriginal title, even for such purposes as agriculture, forestry, and mining.<sup>127</sup> It has done this in spite of the fact that Aboriginal title should enjoy not only the protection against *executive* interference that the common law has traditionally accorded to property rights, but also the additional protection against *legislative* interference that has been its due as a constitutionally entrenched Aboriginal right since 1982.

The political and economic nature of the justification test for infringements of Aboriginal rights, as articulated by Chief Justice Lamer in *Gladstone*, was clearly recognized by Justice McLachlin in her dissent in *Van der Peet*. As we have seen, she said that the Chief Justice had made the concept of infringement "more political than legal" by adding economic and regional fairness and third party interests to the acceptable legislative objectives that could justify infringements of Aboriginal rights.<sup>128</sup> While agreeing with Chief Justice Lamer that reconciliation between Aboriginal and non-Aboriginal communities is "a goal of fundamental importance," Justice McLachlin said this:

The question is how this reconciliation of the different legal cultures of aboriginal and non-aboriginal peoples is to be accomplished. More particularly, does the goal of reconciliation of aboriginal and non-aboriginal interests require that we permit the Crown to require a judicially authorized transfer of the aboriginal right to non-aboriginals without the consent of the

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<sup>124</sup> In fact, this brought Australian law more into line with established common law principles. See works cited *supra* note 6.

<sup>125</sup> The political nature of this compromise is revealed as well in the debate over the *Native Title Act 1993* (Cth.) and the decision, supported by Indigenous leaders, to provide legislative validation to Crown grants issued between enactment of the *Racial Discrimination Act 1975* (Cth.) and the *Native Title Act* that might otherwise be invalid. See Tim Rowse, "How We Got a Native Title Act" in Murray Goot & Tim Rowse, eds., *Make a Better Offer: The Politics of Mabo* (Leichhardt, N.S.W.: Pluto Press, 1994) 111; McRae *et al.*, *supra* note 4 at 247-52; and Noel Pearson, "Land Is Susceptible of Ownership" (10 October 2003) at 34, online: Cape York Partnerships <<http://www.capeyorkpartnerships.com/noelpearson/NPlandSUSCEPTIBLE2003.doc>>.

<sup>126</sup> The Court avoided the issue recently when it refused leave to appeal the Ontario Court of Appeal's decision in *Chippewas of Samia*, *supra* note 2.

<sup>127</sup> See text accompanying *supra* notes 99 and 105.

<sup>128</sup> *Van der Peet*, *supra* note 76 at 659. See text accompanying *supra* notes 90-92.

aboriginal people, without treaty, and without compensation? I cannot think it does.<sup>129</sup>

Reconciliation figured prominently in Chief Justice Lamer's discussion of justifiable infringement of Aboriginal title in *Delgamuukw*. As we have seen, he preceded his list of valid legislative objectives for infringement with the statement that "[m]ost of these objectives can be traced to the *reconciliation* of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty".<sup>130</sup> But as Justice McLachlin made clear in her dissent in *Van der Peet*, what reconciliation really involves in this context is a transfer of the substance of Aboriginal rights to non-Aboriginal persons in the interest of "societal peace."<sup>131</sup> With respect, I agree entirely with Justice McLachlin's view that Chief Justice Lamer's approach to this matter was more political than legal.<sup>132</sup>

#### IV. CONCLUSION

The lesson to be learned from the decisions examined in this article can, I think, be summed up like this: regardless of the strengths of legal arguments in favour of Indigenous peoples, there are limits to how far the courts in Australia and Canada are willing to go to correct the injustices caused by colonialism and dispossession. Despite what judges may say about maintaining legal principle, at the end of the day what really seems to determine the outcome in these kinds of cases is the extent to which Indigenous rights can be reconciled with the history of British settlement

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<sup>129</sup> *Van der Peet*, *ibid.* at 664. For further discussion, see Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 *Indigenous L.J.* 1.

<sup>130</sup> *Delgamuukw*, *supra* note 2 at 1111 [emphasis in original]. See text accompanying *supra* notes 98-99.

<sup>131</sup> *Supra* note 76 at 668 (McLachlin J., however, concurred with Lamer C.J.C. in *Delgamuukw*, raising the question of whether she has given in to the majority on this point. For discussion, see McNeil, *supra* note 129). It is noteworthy that Kirby J. also referred to the need to maintain "social peace" in *Fejo*. See quotation accompanying *supra* note 123. See also the quotation from Lamer C.J.C.'s judgment in *Gladstone* accompanying *supra* note 88.

<sup>132</sup> For further insight into the political nature of the Supreme Court's jurisprudence on Aboriginal rights, see John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 *Am. Indian L. Rev.* 37, and "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 *Osgoode Hall L.J.* 537; Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 *McGill L.J.* 993; Patricia A. Monture-Angus, *Journeying Forward: Dreaming First Nation's Independence* (Halifax: Fernwood, 1999); and Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).



without disturbing the current political and economic power structure.<sup>133</sup> I think this is a reality that Indigenous peoples need to take into account when deciding whether courts are the best places to obtain redress for historical wrongs and recognition of present-day rights. It may be advantageous to formulate strategic approaches that avoid surrendering too much power to the judicial branch of the Australian and Canadian state.

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<sup>133</sup> For a recent example in relation to political power, see Binnie J.'s judgment in *Mitchell*, *supra* note 76. See also Peter H. Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61 Sask. L. Rev. 247.

